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9
10 **UNITED STATES DISTRICT COURT**
11
12 **DISTRICT OF NEVADA**

13
14 PARNELL COLVIN III,
15 An Individual,

16 Plaintiff,
17 vs.

18 AHP REALTY LLC, & QINGWEN KONG,
19 Defendants.

20 CASE NO.: 2:20-CV-00343-GMN-NJK

21
22 **DEFENDANT QINGWEN KONG'S
23 MOTION TO DISMISS**

24
25 Defendants QINGWEN KONG ("KONG"), by and through her counsel of record,
26 Chan Lengsavath Law LTD., hereby moves this Court to dismiss the Complaint (ECF No. 1)
27 ("Complaint").

28 This Motion is made pursuant to Rule 12(b)(1) of the Federal Rule of Civil
Procedure ("FRCP") and based on the following Memorandum of Points and
Authorities, the pleadings and papers on file herein, and any oral argument the Court may
allow.

29
30 **MEMORANDUM OF POINTS AND AUTHORITIES**

31
32 **I. INTRODUCTION**

33
34 Plaintiff, Parnell Colvin III ("Colvin") is a tenant and entered into a residential lease
35 for 6681 Tara Ave., Las Vegas, Nevada ("Property"). He has continually failed to pay rent
36 in accordance with the lease since June 2019 and now owes \$26,000 in back rent. The
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1 Defendant has tried to bring summary eviction proceedings in local justice court, as the
2 court with original jurisdiction on such matters. Instead of litigating the matter before the
3 Las Vegas Justice Court, the Plaintiff has constantly delayed the proceedings by filing
4 bankruptcy petitions and complaints with this Court.

5 This tactic is not new to Colvin. He has filed at least 7 bankruptcy petitions since
6 2015, none of which were properly filed or discharged. Each one was to delay eviction and
7 avoid paying rent. This pattern of bad faith, malicious intent, and waste of the Defendant's
8 and Court's time cannot and should not continue.

9 There is no due process violation. Colvin's "day in court" should be in Las Vegas
10 Justice Court but he has caused the process to be delayed, not the Defendant. The summary
11 eviction process is exactly what Nevada law allows for both landlords and tenants to deal
12 with evictions. In fact, the landlord/defendant in this matter was willing to just allow the
13 tenant to leave and not pursue any past rents. Now, the tenant is forced to seek past rents,
14 court costs, and attorney fees.

15 Therefore, the Defendant asks this Court to dismiss the instant Complaint.

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17 **II. STATEMENT OF FACTS**

19 Plaintiff, Parnell Colvin III ("Colvin") is a tenant and entered into a residential lease
20 for 6681 Tara Ave., Las Vegas, Nevada ("Property"). He has continually failed to pay rent
21 in accordance with the lease since June 2019. On August 12, 2019, a 5-day Notice to Pay or
22 Quit. Instead of paying the rent, the Defendant, as he has done in numerous instances in the
23 past, filed for bankruptcy with the US Bankruptcy Court, District of Nevada (Case# 19-
24 13142-MKN) May 17, 2019. Each bankruptcy petition created an automatic stay of 60-days
25 from the eviction process. Instead of retaining counsel, the Defendant tried to just wait out
26 the 60 days and renew a summary eviction process after the bankruptcy case. That case was
27 dismissed on the Trustee's motion July 8, 2019 due to Colvin's failure to complete the
28 required forms and classes.

1 The Defendant again filed a new summary eviction process. Instead of attending the
2 summary eviction hearing on good faith or moving out of the Property, the Defendant again
3 intentionally and maliciously delayed an eviction by filing another petition for bankruptcy
4 on July 18, 2019 (Case# 19-14597-BTB). However, that case was also dismissed for the
5 same reasons. Not to be deterred, Colvin filed another petition for bankruptcy on January 23,
6 2020. The Defendant filed a Motion for a Stay from the bankruptcy petition but before the
7 hearing on the stay could be determined, that court dismissed the petition for the Plaintiff's
8 failure to file the required documents and attend the required classes yet again.

9 Additionally, the Petitioner has filed claims with this Court twice. The latest being
10 the instant complaint filed on February 18, 2020. All filings in the bankruptcy court and in
11 this have been to avoid rent, to delay eviction, and to maliciously force the defendants to
12 incur attorney fees and court fees. All while the Plaintiff has incurred no costs due to his
13 designation to proceed as *forma pauperis* in each filing, including this current complaint.

14 In the instant complaint, Colvin claimed that his Due Process rights were being
15 violated, presumably, by the local justice court that has original jurisdiction on eviction
16 matters in Nevada. However, his rights are to have hearing for summary eviction with the
17 justice court and he is the one avoiding defense.

18 The Plaintiff is again wasting this Court's and other courts' time by pursuing a
19 frivolous complaint. There is no due process violation. The summary eviction process is
20 exactly what Nevada law allows for both landlords and tenants to deal with evictions. In
21 fact, the landlord/defendant in the matter was willing to just allow the tenant to leave and not
22 pursue any past rents. Now, the tenant is forced to seek past rents, court costs, and attorney
23 fees.

24 A copy of the lease agreement is attached as **Exhibit A**. Currently, Colvin is
25 delinquent \$26,000 in rents because he has not paid any rent since May 2019. A copy of the
26 accounting ledger is attached as **Exhibit B**. Furthermore, the Defendant has attorney fees
27 totaling approximately \$5,000.

1 In light of the foregoing, Movant respectfully requests that the Court dismiss the
 2 current complaint due to a lack of subject matter jurisdiction.

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4 **III. LAW AND ANALYSIS**

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6 **A. Legal Standard**

7 Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for
 8 lack of subject matter jurisdiction. FRCP 12(b)(1). When subject matter jurisdiction is
 9 challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott*
 10 *v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “[t]he party seeking to invoke
 11 the court’s jurisdiction bears the burden of establishing that jurisdiction exists”).
 12 Accordingly, courts presume lack of subject matter jurisdiction until the plaintiff proves
 13 otherwise in response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*,
 14 511 U.S. 375, 377 (1994).

15 “Ordinarily, a case dismissed for lack of subject matter jurisdiction should be
 16 dismissed without prejudice so that a plaintiff may reassert his claims in a competent court.”
 17 *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam). However, where
 18 there is no way to cure the jurisdictional defect, dismissal with prejudice is proper. See *id.*

19 A motion to dismiss under FRCP 12(b)(1) may be construed in one of two ways.
 20 *Thornhill Publ’g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It
 21 may be described as ‘facial,’ meaning that it attacks the sufficiency of the allegations to
 22 support subject matter jurisdiction. *Id.* Alternatively, it may be described as ‘factual,’
 23 meaning that it “attack[s] the existence of subject matter jurisdiction in fact.” *Id.* When, as
 24 here, a defendant asserts a factual attack, “[t]he plaintiff bears the burden of proving by a
 25 preponderance of the evidence that each of the requirements for subject-matter jurisdiction
 26 has been met.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

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1 **B. Discussion**

2 It is well-established that Federal Courts “are courts of limited jurisdiction. They
 3 possess only that power authorized by [the] Constitution and statute, which is not to be
 4 expanded by judicial decree.” Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
 5 377, 114 S.Ct. 1673(1994) (citations omitted). “The requirement that jurisdiction be
 6 established as a threshold matter ... is ‘inflexible and without exception.’” Steel Co. v.
 7 Citizens for a Better Env’t, 523 U.S. 83, 94-95 (quoting Mansfield, C. & L. M. R. Co. v.
 8 Swan, 111 U.S. 379, 382 (1884)). On a FRCP 12(b)(1) motion to dismiss, the court
 9 presumes it lacks subject matter jurisdiction until the plaintiff can prove otherwise. See
 10 Kokkonen, 511 U.S. at 377 (“It is to be presumed that a cause lies outside [the court's]
 11 limited jurisdiction, [] and the burden of establishing the contrary rests upon the party
 12 asserting jurisdiction.”); see also Thornhill Publ'g v. General Tel. & Elecs. Corp., 594 F.2d
 13 730, 733 (9th Cir. 1979) (“[P]laintiff will have the burden of proof that jurisdiction
 14 does in fact exist”).

15 Here, Colvin contends that this Court has subject matter jurisdiction his Due Process
 16 rights being violated. However, pursuant to Nevada Revised Statutes (NRS) 40.253, the Las
 17 Vegas Justice Court is exactly where jurisdiction lies for eviction matters. Furthermore, even
 18 if the Plaintiff were to again assert that he will be filing for bankruptcy, his petition would
 19 not allow for a 60-day automatic stay because Colvin has no “equity in the property” he is
 20 leasing under 11 U.S.C. §362(g)(1).

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IV. CONCLUSION

For all of the foregoing reasons, Defendant respectfully asks this Court to grant Defendant Qingwen Kong's Motion to Dismiss and Motion to Declare Petitioner as a Vexatious Litigant.

DATED this 11th day of March, 2020.

CHAN LENGSAVATH LAW LTD.

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Attorney for Defendant Qingwen Kong

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I certify that on March 11, 2020, I served a true and correct copy of the foregoing DEFENDANT QINGWEN KONG'S MOTION TO DISMISS as follows:

DISMISS as follows:

X U. S. Mail

Fax

Other

_____ Electronic Service to the following:

DATED this 11th day of March, 2020.

CHAN LENGSAVATH LAW LTD.

By: /s/ Melinda Lengsavath
Employee, CHAN LENGSAVATH LAW LTD.